In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 998

DONALD L. WILKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the Eastern District of Virginia on four counts of wilfully attempting to evade his own and his wife's joint income taxes for the years 1960 through 1963, in violation of Section 7201 of the Internal Revenue Code of 1954 (Pet. 1a–2a, 19a; I.R.).[1] Petitioner is an attorney with experience in corporate management and as an editor for a tax service. His wife, also an attorney, was a county supervisor (Pet. 17a).

[1] The record in this Court consists of eleven numbered volumes, the last eight of which are separately paginated. Volume I contains the pleadings and orders in the courts below; Volume II contains the defendant's exhibits; and Volume III contains the government's exhibits. None of these three volumes is paginated. References will be given to the pertinent volume, with the page numbers where possible.

289-488—68

Petitioner owned a home on a 32-acre tract. In 1956 a portion of the property was taken in condemnation proceedings and the remainder was split into two separate tracts. Petitioner received a condemnation award of $15,568.50 at the time of the taking (Pet. 2a–4a).

In 1958 he subdivided one of the remaining tracts and entered into a contract to sell 25 lots to a builder for $112,500. Petitioner was to install sewers and streets, and payments were to be made by the builder out of the proceeds from sales of the lots (Pet. 2a–3a; III R., Exh. 6). Petitioner received payments of $14,236.25 in 1958, $55,500 in 1959, and $37,000 in 1960 from the builder (Pet. 2a–3a; III R., Exh. 3A; V R. 214). In 1959 petitioner sold four additional lots for which he received $2,229.70 and a note for $14,800, which he collected in 1960 (Pet. 3a; III R., Exh. 3B; V R. 141). No mention of any of this income appeared in petitioner's tax returns prior to that for 1959, to which he attached a note stating that all of the income subsequent to the condemnation award arose out of a "continuing transaction" which would be reported when completed (Pet. 3a; III R., Exh. 1D). Petitioner purported to report all such income in his 1960 return (Pet. 3a; III R., Exh. 1E). However, he omitted approximately $39,000 in proceeds from the sale of the lots, overstated subdivision expenses by about $16,000, and overstated the costs of obtaining the condemnation award by some $7,000 (Pet. 4a; VI R. 223–237, 241). An additional $4,000 understatement of taxable income for 1960 resulted from petitioner's omission of interest income, omission of his

wife's salary, and overstatement of deductions for interest expense and for automobile depreciation (Pet. 4a).

In 1961 the other remaining tract of land, on which petitioner's house was located, was leased for 99 years to a corporation, United Properties, for a total rental of $2,213,820. Under this lease petitioner received $22,590 in 1961, $22,590 in 1962, and $18,072 in 1963, all of these amounts being recorded in the books of United Properties as payments of rentals. Petitioner, however, did not report them as income in his returns for those years. When questioned by IRS agents, he stated that these payments were non-taxable since he had an agreement with the lessee, not reflected in the lease, that the payments for the first three years actually constituted purchase money for his house, and since he planned to use said money for another dwelling to replace the one allegedly being sold to the corporation. As proof, petitioner furnished to the agents a document, dated August 15, 1961, purporting to be such an agreement. At trial this document was shown to have been prepared in 1964, after the institution of the IRS investigation (Pet. 11a–12a; VI R. 53, 69–71, 75, 144; VII R. 62).

Despite petitioner's election to treat the income from the sale of the lots as a "continuing transaction" reportable in 1960 when finally completed,[2] the court

[2] The government's theory on the 1960 count, incorporated by the trial court in its charge to the jury (Pet. 10a; VIII R. 157), was that petitioner had properly elected to report the lot sales as a "completed contract" under Treas. Reg. Sec. 1.451–3(a), (b)(2) (26 C.F.R. 1.451–3). The court of appeals (Pet. 6a–

of appeals reversed the conviction on the 1960 return count on the ground that most of this income was attributable to earlier years, that petitioner had a right to show that there was no tax deficiency for 1960, and that the attribution of such income to 1960 was prejudicial to his conviction on that count (Pet. 5a–11a, 20a). Petitioner's conviction was affirmed on the other three counts (Pets. 18a, 20a), and a petition for rehearing was denied by the court *en banc* (Pet. 21a).

DISCUSSION

1. Petitioner contends (Pet. 7–16) that the court of appeals erred in approving an instruction of the trial court (VIII R. 165; IX R. 15–16) to the effect that the jury could infer that petitioner intended the natural and probable consequences of all acts knowingly done, unless the evidence led the jury to a contrary conclusion.[3] In substance, petitioner's argument is that the decision below, which relied upon *Sherwin* v. *United States,* 320 F. 2d 137 (C.A. 9), certiorari denied, 375 U.S. 964, rehearing denied, 376 U.S. 946, is in conflict with *Mann* v. *United States,* 319 F. 2d 404 (C.A. 5), certiorari denied, 375 U.S. 986.

Sherwin and *Mann* were before this Court con-

11a) rejected the government's argument that petitioner's transaction differed from that involved in *Wood* v. *Commissioner*, 245 F. 2d 888 (C.A. 5), where the court held that profits from subdivision sales should be reported annually, and accordingly reversed the conviction on this count on the authority of *Sansone* v. *United States*, 380 U.S. 343, 351, and *Lawn* v. *United States*, 355 U.S. 339, 361 (Pet. 5a).

[3] At the trial, defense counsel specifically disclaimed any objection to the charge as given (VIII R. 175).

temporaneously during the 1963 Term, and the government opposed certiorari in both cases[4] on the ground that, despite the superficial conflict, there was no necessary inconsistency between the two decisions in view of the dissimilarity in the evidence at the respective trials. Both petitions were denied.[5] In the instant case, as in *Sherwin,* there was evidence that petitioner had deliberately falsified records, and the jury was repeatedly and emphatically charged on the distinction between wilful fraud and negligent or careless oversight (Pet. 16a–17a; VIII R. 153–167; IX R. 8–16). In these circumstances, we cannot see how the court's charge could somehow have given the jury the idea that the burden of proof on the issue of intent had been shifted from the prosecution to the defense. In a very similar case the Fifth Circuit itself has distinguished its prior holding in *Mann. Helms* v. *United States,* 340 F. 2d 15, 18–19, certiorari denied, 382 U.S. 814.[6] Moreover, the model instruction (Pet. 14) which was used in the *Mann* case has now been revised. See Mathes and Devitt, *Federal Jury Practice and Instructions, Civil and Criminal,* Par. 10.06 (1965). In sum, review in this Court as to the propriety of the instruction given is not warranted.

2. Petitioner further contends (Pet. 16–27) that the evidence of pre-1960 income, which the court of

[4] The government's petition in the *Mann* case was only conditional upon the grant of the petition in *Sherwin.*

[5] Certiorari was denied in *Sherwin*, No. 519, 1963 Term, on January 6, 1964, and in *Mann*, No. 662, 1963 Term, on January 13, 1964.

[6] Cf. *Hardaway* v. *United States*, 321 F. 2d 89 (C.A. 5), certiorari denied, 376 U.S. 950.

appeals held to be prejudicial as to the 1960 return count, also affected the 1961, 1962 and 1963 return counts and calls for a reversal as to them as well. We recognize that the court of appeals concluded (Pet. 10a–11a) that the evidence of petitioner's pre-1960 transactions, admitted by the trial court as proof of unreported 1960 income, might have been the basis for the jury's finding of guilt on the 1960 count despite the fact that there was other independent evidence upon which such a verdict could have rested. However, the court of appeals was careful to point out (Pet. 18a) that the pre-1960 transactions had no effect upon the verdict on the 1961, 1962 and 1963 counts. In this determination, we submit, the court of appeals was clearly correct.

In the first place, the evidence as to the 1960 count was, as has already been noted (*supra,* pp. 2–3), quite separate from that relating to the 1961, 1962 and 1963 counts. The alleged unreported income for 1960 came from transactions involving one tract of land, while that for 1961, 1962 and 1963 came from transactions involving another piece of property. There was, therefore, little danger that the evidence on the 1960 count would "permeate" (Pet. 17–18) the entire case, provided the jury was properly instructed that each count must stand on its own. Here such an instruction was given by the trial court, clearly and repeatedly (VIII R. 152–153, 155–163, 174–175; IX R. 7–12), and it must be presumed that the jury conscientiously observed the admonitions of the trial court. *Delli Paoli* v. *United States,* 352 U.S. 232, 240–241; *Opper* v. *United States,* 348 U.S. 84, 95; *United States*

v. *Harris,* 211 F. 2d 656, 659 (C.A. 7), certiorari denied, 348 U.S. 822.

Moreover, consideration by the jury of the evidence relating to pre-1960 transactions was not in any event improper, since such evidence plainly bore on the issue of petitioner's intent as to the 1961, 1962 and 1963 counts.[7] It is undisputed that the full amount of the income from the pre-1960 transaction was never reported, either in 1960 or before, and it is well settled that a prior act of a similar nature may be proved to demonstrate intent and purpose. *Glasser* v. *United States,* 315 U.S. 60, 81; *United States* v. *Taylor,* 305 F. 2d 183, 185 (C.A. 4), certiorari denied, 371 U.S. 894; *Yarborough* v. *United States,* 230 F. 2d 56, 63–64 (C.A. 4), certiorari denied, 351 U.S. 969; *United States* v. *Alker,* 260 F. 2d 135, 157 (C.A. 3), certiorari denied, 359 U.S. 906; *Herskovitz* v. *United States,* 209 F. 2d 881, 885 (C.A. 2).

Here, in view of the particular circumstances and the nature of the 1960 count, the introduction of evidence relating to the pre-1960 transactions may have been prejudicial in regard to whether there was a tax deficiency for 1960. But such evidence was not improperly admitted on the question of petitioner's overall intent to evade taxes. Were the case retried without the 1960 count, it seems clear that the evidence about which petitioner complains would be ad-

[7] Although petitioner does not mention it, such an instruction was given to the jury (IX R. 11). And in denying a new trial the trial judge commented (X R. 28): "Certainly, for the purpose of showing intent, it would have been proper for the government to have referred to these other matters."

missible to show his intent in 1961, 1962 and 1963 and the wilfullness of the violations charged in those counts (see Pet. 8a).

In view of the foregoing, it is respectfully submitted that the petition for certiorari should be denied.

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